$500,000; the maximum sentence permissible under the law was one of 3 years' imprisonment and, so far as the fine is concerned, unlimited.

First, it is appropriate to state the principles upon which this Court, as an appellate court, should act when considering an appeal as to the sentence imposed by a trial court. It is axiomatic that each case depends on its own facts. It is also an elementary principle that an appellate court can and will interfere if the sentence imposed was not justified by law. Mr. Knight has referred us to a passage in *Archbold,* which we accept, setting out the principles upon which an appellate court acts.

One principle is that the Court can interfere if it is satisfied that the sentencing Judge has made the wrong decision as to the proper factual basis for sentence. In relation to this principle, it has not been shown to our satisfaction by Mr. Karthigesu, who has related in detail the facts which were put before Lai Kew Chai J. that he imposed the sentence on a basis other than the proper factual basis. It is to be observed that the facts set out in the Statement of Facts which was read out to the learned Judge were unequivocably accepted by the appellant.

Another principle is that the Court can interfere where it is satisfied that there has been an error on the part of the trial Judge in appreciating the material placed before him. The judgment of the trial Judge sets out fully, and in our opinion, accurately, the background facts which led to the charge against the appellant, which was a misuse of Pan El funds in circumstances which amounted to criminal breach of trust. The funds were used to create an artificial price for the shares of GUH. It was accepted by the learned Judge that it was done for the personal benefit of the appellant.

It was the appellant who gave instructions to Tan Kok Liang to go into the open market and manipulate the market price of GUH shares and by raising the price, a result of which was favourable for the appellant. So we are not satisfied that the trial Judge erred in any way in appreciating the material placed before him.

Also, having regard to the facts placed before Lai Kew Chai J. which were undisputed by the appellant, the learned Judge found that the offence was not an unpremeditated one in so far as the appellant was concerned.

Another principle is that the Court can interfere if it is satisfied that the sentence was wrong in principle. This has not been shown, and in our opinion, the sentence was one which in no respect can be said to be wrong in principle.

The last principle which we need to refer to is that the Court if satisfied that the sentence imposed was manifestly excessive can interfere.

Having regard to all the circumstances of the case, in particular, having regard to the commercial matrix the background facts and the fact that the offence was committed in order to manipulate the market price of a publicly listed company in Singapore we are of the opinion that the sentence which the trial Judge imposed – of 2 years' imprisonment and $500,000 fine – was not excessive, let alone manifestly excessive.

In the result, this appeal must be dismissed and the sentence affirmed.

Appeal dismissed.

Solicitors: *Cooma, Lau & Loh & M. Karthigesu.*

MOUNT ELIZABETH (PTE). LTD. v. THE COMPTROLLER OF INCOME TAX

[A.C.J. (Chan Sek Keong J.C.) September 5, 1986]

[Singapore – Civil Appeal No. 19 of 1985]

Revenue Law – Income Tax – Additional assessment on surplus resulting from sale of flats – Whether capital receipt or trading profits – Whether sufficient evidence present to justify imposition of income tax.

The appellant which was incorporated on July 8, 1970 developed a block of high-rise apartments on the property known as "High point." The sale of the flats commenced in 1971. Of the 59 apartments constructed 51 were sold between 1971 and 1973 and 8 were retained by the appellant. Six of the retained flats were sold in 1980. On November 27, 1981 the Comptroller of Income Tax (the Comptroller) made an additional assessment for the year of assessment 1981 against the appellant in respect of the profits derived from the sale of 6 of the 8 Highpoint flats. The appellant objected to the additional assessment and appealed to the Income Tax Board of Review (the Board).

Before the Board, counsel for the appellant contended that the surplus from the sale of the 6 flats was a capital accretion on the ground that the appellant's intention from the start was to develop some flats for sale and to retain some flats for investment and that the appellant was carrying on two activities *i.e.* (1) the principal activity of proper-

ty development for sale which came to an end in 1973 and (2) a subsidiary activity of letting out flats. Counsel for the Comptroller, however, contended that the surplus arising from the sale of the 6 flats was a trading receipt on the ground that the appellant was carrying on business of property development, that property development meant property development for sale and that the Highpoint flats were constructed in the course of such business. The appeal before the Board was dismissed.

The appellant appealed against the decision of the Board.

Held, dismissing the appeal: (1) the appellant could only succeed in its appeal if it can show that the Board had either misdirected themselves on the law or had proceeded without sufficient evidence in law to justify their conclusion;

(2) in the present case, there was sufficient evidence for the Board to reach the conclusion they did.

Cases referred to:

(1) *CIR* v. *Reinhold* 34 T.C. 389, 392, 397.
(2) *Bradshaw* v. *Blunden* 36 T.C. 397, 409.
(3) *Harvey* v. *Caulcott* 33 T.C. 159, 163, 165.
(4) *West* v. *Phillips* 38 T.C. 203, 207.
(5) *Seaward* v. *Varty* 40 T.C. 523, 530, 533, 535.
(6) *International Investments Ltd.* v. *Comptroller – General of Inland Revenue* [1975] 2 M.L.J. 208, F.C.; [1979] 1 M.L.J. 4, 6, P.C.
(7) *Granville Building Co. Ltd.* v. *Oxby* 35 T.C. 245, 250.
(8) *James Hobson & Sons* v. *Newall* 37 T.C. 609, 617.
(9) *Shadford* v. *H. Fairweather & Co. Ltd.* 43 T.C. 291, 299.
(10) *Bowie* v. *Reg. Dunn (Builders) Ltd.* 49 T.C. 469, 479.
(11) *Gray & Gillitt* v. *Tiley* 26 T.C. 80.
(12) *Turner* v. *Last* 42 T.C. 517.
(13) *Oliver* v. *Farnsworth* 37 T.C. 51, 53, 55.
(14) *WM Robb Ltd.* v. *Page* 47 T.C. 465.
(15) *Orchard Parks Ltd.* v. *Pogson* (1964) 42 T.C. 442.
(16) *Gloucester Railway Carriage and Wagon Co. Ltd.* v. *CIR* 12 T.C. 720, 747.
(17) *Edwards* v. *Bairstow & Harrison* (1955) 36 T.C. 207, 227-228.
(18) *CBH* v. *Comptroller of Income Tax* [1982] 1 M.L.J. 112 C.A.
(19) *Simmons* v. *IRC* [1980] 2 All E.R. 798.
(20) *ABC* v. *The Comptroller of Income Tax* [1959] M.L.J. 162.
(21) *Commissioners of Inland Revenue* v. *Hyndland Investment Co. Ltd.* 14 T.C. 694.
(22) *STU* v. *The Comptroller of Income Tax* [1962] M.L.J. 220.

CIVIL APPEAL.

Sat Pal Khattar for the appellant.

Loo Lian Ee (Miss) (Assistant Commissioner of Inland Revenue) for the respondent.

Cur. Adv. Vult.

Chan Sek Keong J.C.: This is an appeal against the decision of the Income Tax Board of Review (the "Board") dismissing the appeal of the appellant against the additional assessment made by the Comptroller of Income Tax (the "Comptroller") for the year of assessment 1981 on the surplus resulting from the disposal of 6 flats which were together with 53 other flats developed by the appellants during 1971-1973. The surplus was $2,093,387.00 and the additional tax assessed was $857,770.00.

Before the Board, the following facts were agreed between the parties:

(1) The appellant was incorporated on July 8, 1970.

(2) The appellant on September 28, 1970, resolved to ratify a purchase of a piece of land known as 26/27 Mount Elizabeth ("the property") for $852,006.

(3) By December 31, 1970 the purchase had been completed with funds substantially from its share capital.

(4) The appellant immediately proceeded to develop a block of high-rise apartments on the property known as "Highpoint."

(5) The sale of the flats commenced in 1971.

(6) The paid-up capital of the appellant was increased to $1.5 million in 1971.

(7) The development of Highpoint was financed largely by shareholders' funds, loans from a related company and progress payments from purchasers.

(8) Of the 59 apartments constructed, 51 were sold between 1971 and 1973 and 8 were retained by the appellant.

(9) 6 of the retained flats were sold in 1980.

(10) In 1973 the appellant made 2 further purchases of land:–
  (a) land at Draycott Drive Lot 12-103 for $1,771,974.88; and
  (b) land at Farrer/Holland Road for $5,111,106.00.

(11) Development expenditure was incurred in respect of these 2 sites and planning approval

was obtained for the construction of 23 units of luxurious apartments on the Draycott site.

(12) In 1980 the appellant sold the Farrer/Holland Road property. The profit from the sale was subject to tax.

In addition to the agreed facts, the following facts which are relevant to this appeal are disclosed in the Agreed Bundle of Documents submitted to the Board. These facts are as follows:

(1) The relevant objects of the appellant as set out in its Memorandum of Association are:

"3(1) To acquire by purchase, lease, exchange, hire or otherwise, lands and property of any tenure, or any interest in the same, in Singapore.

(2) To erect and construct houses, buildings or works of every description on any land of the company, or upon any other lands or property, ... and generally to deal with and improve the property of the company.

(13) To develop and turn to account any land acquired or in which the Company is interested, and in particular by laying out and preparing the same for building purposes, constructing, decorating, maintaining, furnishing, fitting up improving altering pulling down and re-erecting or reconstructing buildings and by planting, paving, draining, farming, cultivating, letting on building lease or building agreement and by advancing money to and entering into contracts and arrangements of all kinds with buildings, tenants and others.

(27) (a) To carry on all or any of the businesses of proprietors of flats maisonettes, dwelling-houses, shops, offices and clubs, and for these purposes to purchase, take on lease, or otherwise acquire and hold any lands or buildings of any tenure or description wherever situate, or rights or interests thereon or connected therewith .....;"

(2) The financial year of the appellant ended on December 31 of each year. The directors' report ("the directors' report") to the audited accounts of the appellant for the financial year 1970 stated, *inter alia,* that "The Company is engaged in the construction of a block of luxury flats which is expected to be completed and ready for occupation in 1973." In the accompanying balance sheet, the property was classified as and under the item "Development Project."

(3) Each of the directors' reports for the financial years 1971 to 1973 stated, *inter alia,* that the appellant's "principal activity is the development and construction of luxury apartments for sale. There has been no change in the nature of this activity during the year." In the relative balance sheets, the freehold land was classified as and under the item "Development Project."

(4) In each of the directors' report for the financial years 1974 and1975, the description of the Company's activity was the same as for 1971 to 1973 (except for the omission of the word "principal"), but in the related balance sheets a new item appeared under the classification "Fixed Assets." It is common ground that the fixed assets referred to were the 8 Highpoint flats which were retained by the appellant.

(5) In each of the directors' reports for the financial years 1976 to 1981, the description of the activities of the Company was "property development and the holding of property for rental." It further stated that "during the year, the company did not undertake any property development but rented out its apartments held for investment. There have been no changes in the nature of these activities during the year." The 8 flats continued to be classified in each of the relative balance sheets as "Fixed Assets."

(6) By a letter dated May 24, 1974, the appellant's solicitors informed the Controller of Housing that all the flats in Highpoint had been sold except for 8 flats which the appellant was not selling "as they would like to let out these flats." By a letter dated February 18, 1975 the appellant informed the Controller of Housing that it had deliberately withheld the sale of some apartments which "we intend to retain for investment purposes." By a letter dated August 23, 1975, the appellant again informed the Controller of Housing that 8 flats were being retained by it, but this letter did not offer the additional information that the 8 flats were retained for the purpose of investment.

(7) On November 27, 1981, the Comptroller made an additional assessment for the year of assessment 1981 against the appellant in respect of the profits derived from the sale of 6 of the 8 Highpoint flats. On November 4, 1981 the appellant, through its solicitors, wrote to the Comptroller and objected to the additional assessment the ground that the amount of $2,093,387.00 being the surplus from the sale of 6 flats, was a capital receipt and not liable to tax. The ground of objection as set out in paragraph 3 of the letter reads as follows:

"It is not denied that our clients were in fact a developer. However that does not make every property that it owns a current asset. The accounts bear this out. If you would look at the balance sheet and accounts for the period ending 31st December 1974 and onwards you would quite clearly notice the two holdings are separately reflected by our clients in the accounts. Since 1974 these properties were always reflected as fixed assets."

In support of this objection, copies of the appellant's correspondence with and returns made to the Controller of Housing were enclosed in the said letter.

(8) By a letter dated December 15, 1981, the Comptroller requested the appellant to state the reasons for the sale of the 6 Highpoint flats when it had claimed that the 6 flats were retained for investment. By a letter dated December 22, 1981, the solicitors for the appellant replied that every investment had to be reviewed occasionally as to whether or not the continued holding of it was still relevant in terms of the investment objective and that in 1980, the appellant felt that the sudden upsurge in the prices of its investment did not justify its continued retention and hence decided to sell the 6 flats.

(9) By a letter dated April 3, 1982, the appellant's solicitors furnished to the Comptroller particulars of the rental history of the 6 flats which showed that 3 flats had been rented out continuously from 1974 to 1980 and 3 flats had been rented out continuously from 1975 to 1980.

(10) The income derived from the letting of the 8 flats for each of the relevant years had been assessed to tax under section 10(1)(a) of the Income Tax Act on the basis that it was part of trading profits and not investment income and no objection was raised by the appellant to each of the said assessments.

At the hearing of the appeal to the Board, the appellant called Mr. Lim Chor Pee, (AW1) an advocate and solicitor, who was also a director of the appellant from 1970 to 1978, to testify. His evidence was as follows:

(a) In 1970, he was instructed by an Indonesian businessman, Jauw Hin Liang @ Jan Darmadi ("Darmadi") to act for him in the purchase of the property on which he wanted to build a block of apartments for sale and investment. AW1 advised Darmadi to form a limited liability company to carry out his objective and so the appellant was incorporated on July 8, 1970, for that purpose. Darmadi was in effect the owner of the appellant. The completion of the purchase in December 1970 was substantially financed from shareholders' funds. Construction commenced in 1971 and the sales of the flats commenced in 1971 after the appellant obtained a developer's licence. AW1 also said that "Shortly after Darmadi bought the property for Mt. Elizabeth he told me he did not want to sell all the flats. He specifically instructed me to keep the 2 penthouses for himself and to retain 8 apartments."

The Highpoint development was largely self-financed. Darmadi was not worried about additional funding even though all the flats were not sold in 1971. Part of the funding came from progress payments. As at February 31, 1972, the appellant had repaid its small bank overdraft and any shortfall in funding the development, if any, was financed by borrowings from a related company. There was at that stage no external borrowing. The Farrer Road and Draycott Drive projects which were purchased in 1973 were financed by loans from a related company.

The appellant did not have a proper sales office until the show room in Highpoint was built. The sales office was closed in 1973. The appellant stopped selling the Highpoint flats after mid-1973. The total profit before tax or the sale of 51 Highpoint flats amounted to $982,826. Darmadi himself purchased the two penthouses when the flats were ready for occupation. The Temporary Occupation Licence for Highpoint was issued in 1974.

AW1 arranged for the 8 flats to be furnished for letting but eventually 7 were let out fully furnished and 1 was let out unfurnished. The appellant spent a considerable sum of money in furnishing the 7 flats. AW1 maintained that this was in keeping with the appellant's intention to keep them. No attempt was made to sell the 8 flats until 1980 when 6 were sold. The 6 flats were sold in 1980 because in 1980, Darmadi made a business decision to sell off all or most of his assets in Singapore. Pursuant to that he also sold the Farrer Road property in 1980 and the Draycott Drive property in 1981. The properties then retained by the appellant were 2 flats in Highpoint and the house in Brizay Park.

(b) In cross-examination, AW1 said the Brizay Park house was not sold in 1980 because a director of the appellant, one Eddy Dharma was living in it, the property having been purchased for that purpose. When asked why Darmadi did not purchase

the 8 flats in addition to the 2 penthouses, AW1 said that the penthouses were for Darmadi's personal use, he had no intention to let them out or sell them, the 8 flats were for earning a rental income and as far as Darmadi was concerned, he looked upon the appellant as his personal company. AW1 also said that the 8 flats were chosen at random, that he did not know why 8 and not 10 were chosen. He agreed that flats 30D, E and F would fetch a slightly lower price because of their poor location but denied that they were retained because the appellant could not sell them. He said that flats 30A, B and C, which had the worst views, had been sold and that after the sales office was closed there were people badgering the appellant to sell. When asked whether, if the appellant had wanted to retain the flats for rental, it would have made more sense to choose the better flats, AW1 replied:

"No it does not because the rental difference between an apartment with a better than poorer view is very small, a couple of hundred dollars at most. Since Darmadi did not specify whether he wanted to retain the apartments with the best views and left the discretion to me I was of the view that we should sell off the most expensive flats in order to make a bigger profit for the company."

AW1 denied a suggestion that the 8 flats were not retained for long term investment but were let out pending the time they could fetch better prices. He insisted that his instructions were not to sell the 8 flats at all. He went on to say:

"The profits at that time were not very great from this development. Darmadi was at that time making a lot of money in Indonesia and he was not interested in making a few thousand dollars here and there. In fact the profits he made from this development he never draw at all. He instead pumped more money into the company."

AW1 admitted that neither the appellant nor its directors had passed any corporate resolution to retain the 8 flats or to sell them. He admitted that the appellant had used a sales brochure in the marketing of the Highpoint flats. He admitted that he understood the directors' reports before he signed them and when asked whether the statements therein were accurate statements of the appellant's intention and activities at that time, AW1 said the directors' reports could not set out every intention of the appellant and that ideally and theoretically a directors' report should have been more comprehensive.

AW1 also said that the expression "for investment purposes" meant to let out and earn a rental income for an unspecified period of time, and in this case Darmadi had wanted to keep the flats forever.

Before the Board, counsel for the appellant contended that the surplus on the sale of the 6 flats was a capital accretion on the ground that the appellant's intention from the start was to develop some flats for sale and to retain some flats for investment and that the appellant was carrying on two activities (1) the principal activity of property development for sale which came to an end in 1973 and (2) a subsidiary activity of letting out flats. It was contended that the appellant's intention was borne out by the following facts:

(a) the appellant had little external borrowing and therefore was under no financial pressure to sell;

(b) the appellant did not have any trading activity from 1973 to 1980 and even though many subsales of the other flats were transacted during this period;

(c) the categorical statements consistently made to the Controller of Housing that the 8 flats were being retained as investment long before any tax ramifications arose;

(d) the appellant had furnished the flats at considerable cost;

(e) the flats were consistently treated as "fixed assets" in the audited accounts of the appellant since 1974 and taxed as such.

The following cases were cited by counsel for the appellant to the Board: *CIR* v. *Reinhold*;[1] *Bradshaw* v. *Blunder*;[2] *Harvey* v. *Caulcott*;[3] *West* v. *Phillips*;[4] *Seaward* v. *Varty*;[5] *International Investments Ltd.* v. *Controller-General of Inland Revenue*.[6]

Counsel for the Comptroller contended that the surplus arising from the sale of the 6 flats was a trading receipt on the ground that the appellant was carrying on business of property development, that property development meant property development for sale and that the Highpoint flats were constructed in the course of such business. She contended that such a conclusion was supported by the following facts:

(a) the appellant by a letter dated January 4, 1971 informed the Comptroller that the business

conducted by the appellant was property development;

(b) each of the directors' reports from 1971 to 1974 stated that the development and construction of luxury apartments for sale was either its principal activity or sole activity;

(c) there was no corporate resolution to retain the 8 flats as investment;

(d) during the construction of the flats, no distinction was made in the appellant's accounts between those units to be sold and those to be retained;

(e) the 8 flats were builder's remainders as they could not be sold on account of their poor location or alternatively, the appellant's intention was to sell them at a later but more favourable opportunity;

(f) the classification of the 8 flats as "fixed assets" in the appellant's balance sheets as from 1974 was not conclusive against the Comptroller and was self-serving;

(g) the letting of the flats for 6 years before sale was irrelevant in the case of a property developer and did not change their character as trading stock;

(h) the Comptroller had always treated the rents as part of trading receipts of property development, without any objection from the appellant.

Counsel also contended that the onus of proof was on the appellant to show that the profits arising from the sale of the flats were profits from the sale of investments and that such onus was greater on a company than on an individual.

[The following cases were cited by counsel for the Comptroller to the Board: *Harvey* v. *Caulcott*;[3] *Granville Building Co Ltd* v. *Oxby*;[7] *James Hobson & Sons Ltd.* v. *Newall*;[8] *Shadford* v. *H. Fairweather & Co Ltd*;[9] *Bowie* v. *Reg. Dunn (Builders) Ltd*;[10] *Gray & Gillitt* v. *Tiley*;[11] *Turner* v. *Last*;[12] *Oliver* v. *Farnsworth*;[13] *WM Robb Ltd.* v. *Page*;[14] *Orchard Parks Ltd.* v. *Pogson*;[15] *Gloucester Railway Carriage and Wagon Co. Ltd.* v. *CIR.*[16]]

After receiving written submissions from both counsel on the cases cited by each of them, the Board delivered its written judgment on April 8, 1985. The Board found that the appellant was carrying on the business of property development for sale and that the Highpoint flats were constructed for sale in the course of such business. The grounds on which the Board supported its finding were:

(a) the appellant had been incorporated solely for the purpose of purchasing the property at Mount Elizabeth and developing the flats thereon in question;

(b) the absence of any resolution regarding the retention of the flats in question;

(c) Darmadi had intended to retain the 8 flats until such time as they could fetch a better price (the grounds for this finding being that (i) AW1 had said that the profits from the development were not very great, and that Darmadi was making a lot of money in Indonesia and was not interested in making a few thousand dollars here and there, and (ii) otherwise, Darmadi would have purchased the 8 flats in the same way as he had purchased the 2 penthouses.);

(d) the appellant's acceptance of the Comptroller's treatment of its rental income as trading profits and all the other evidence showed that the treatment by the appellant of the 8 flats as fixed assets from 1974 onwards and the retention of and letting out of the flats for 6 years did not indicate the true nature of their retention;

(e) all the circumstances surrounding the development of the Highpoint flats.

The Board was of the view that the appellant had not discharged the onus of proving that the profits in question arose from the sale of an investment and not from trading stock. Accordingly, the Board dismissed the appeal.

The appellant now appeals against the decision of the Board on the ground that the Board was wrong in law and in fact in holding that the 6 retained flats were trading stock and that the surplus derived on their disposal was part of the trading profits of the appellant. Counsel for the appellant submitted that the Board's finding was made without any or adequate evidence to support it, or, if there was evidence, the finding was an inference from primary facts, and as such an appel-

late court could, in an appropriate case, draw a contrary inference, and he urged me to do so. It was said that the primary facts relied on which the Board were equally capable of supporting a finding of and the Board should have found a dual or composite intention on the part of the appellant. He referred to the *locus classicus* on this point of law *i.e.* the judgment of Lord Radcliffe in *Edwards* v. *Bairstow & Harrison*[17] at page 227 and also the judgment of Lord Wilberforce in *Simmons* v. *IRC.*[18] Counsel also said that the Board had also failed to deal specifically with other relevant facts before them which were favourable to the appellant's case.

It was contended that the Board failed to give any or inadequate consideration or insufficient weight to or draw the correct inferences from the facts set out in paragraph 6 of this judgment and from the following facts:

(a) the expression "Property Development" used to describe the appellant's business in its letter dated April 14, 1971, was neutral as the purpose of development could be for sale or for investment or for both; likewise, the expression "the construction of a block of luxury flats" as used in the directors' report for the financial year 1970;

(b) also, the use of the adjective "principal" to qualify the activity of the appellant in the directors' report for the financial years 1971 to 1973 implied or was not inconsistent with the appellant carrying on a subsidiary activity of holding property for investment;

(c) that it was neither realistic nor practicable for the appellant to specifically distinguish in its audited accounts those flats for sale and those for investment until the flats had been completed, whereupon the appellant had aptly classified them as fixed assets, and that the expression "Development Project," a neutral expression, was also an apt description of the development at that stage;

(d) that the classification of the 8 flats as fixed assets in the balance sheets from 1974 onwards negatived any adverse inference that could be drawn from the absence of any corporate resolution regarding their retention;

(e) that the appellant's omission to object to the assessments of rental income as part of its trading receipts might have been due, firstly, to the futility of so doing since the Comptroller was not, under the law, required to specify the sources of income in his notice of assessment – see *ABC* v. *The Comptroller of Income Tax*[20] or secondly, to the superfluity of so doing since the rate of tax for investment income and trading income was the same.

It was further contended that the Board's omnibus reference to "circumstances surrounding the development" was clear and therefore unsatisfactory; that their finding that if Darmadi had intended to retain the flats as investment, he would have purchased them from the appellant, was an incorrect hypothesis, and that the Board's finding that "the flats had been retained until such time when they could fetch a better price since according to Lim 'the property market started to move after 1974' " made no sense because, if I understood the argument correctly, it was not possible to say what a better price was and what such time in the future was for determining such better price.

Finally, counsel contended that as the evidence adduced by the appellant was not seriously challenged or controverted by the Comptroller, the appellant had discharged the onus, which he conceded, was higher on it than on an individual, of proving that the profit in question was a capital receipt.

In the context of Lord Radcliffe's speech in *Edwards* v. *Bairstow & Harrison,*[17] at pages 227-8 and the Court of Appeal's decision in *CBH* v. *Comptroller of Income Tax*[18] as to the test an appellate body must apply in hearing an appeal of this nature, the submissions of counsel for the applicant can be distilled and encapsulated into one contention, and that is, the Board erred in law in that no reasonable body of members constituting an Income Tax Review Board could have reached the findings reached by the Board in this instance. When the appellant's appeal is reduced to this dimension, it becomes apparent that, in this appeal, the appellant has a heavy burden to discharge before achieving lift off. Clearly, the Board had ample evidence before them to make the findings they did. Although in their written judgment the Board might not have addressed each of the appellant's submissions, they have dealt specifically with the main points and pointedly said they had taken into account all the other circumstances. Whilst counsel for the appellant may justifiably criticise the Board's faulty reasoning that if Darmadi had intended to retain the 8 flats as an investment he would have purchased them in his own

name, it could not be said that the finding itself, *i.e.* of Darmadi's intention, was wrong, as it was supported by an alternative but valid ground *i.e.* Darmadi's disinterest in making small money from the development, which ground the Board, in fact, also relied upon. Again, the Board might not have made a microscopic appraisal of AW1's evidence on the original intention of Darmadi, but their primary finding was an implicit rejection of AW1's evidence on this point.

What was the tenor of the undisputed facts relied on by the appellant? Except for the oral evidence of AW1 on Darmadi's intention, substantially all the other material facts that were garnered in aid of the appellant's case were colourless facts. There facts were:

(1) the retention of 8 flats for 6 years – see *Oliver* v. *Farnsworth*[13] (sale proceeds of house built by builder in 1929 and sold in 1953, held to be trading receipt); *James Hobson & Sons Ltd.* v. *Newall* (where houses built by company were not saleable and let for almost 24 years, held that houses were part of trading stock);

(2) the statements to the Controller of Housing that 8 flats were retained as investments and the classification of 8 flats as "Fixed Assets" in balance sheets of appellant from 1974 to 1981 – see *Shadford* v. *Fairweather & Co. Ltd*[9] (land purchased in 1958 by company and described as fixed asset in its accounts sold in 1960, held: a trading transaction; *Bowie (H.M. Taxes)* v. *Reg. Dunn (Builders) Ltd*[10] (property held by company, a builder, since date of purchase in 1958 as a fixed asset in its accounts until 1966 when it was sold: held, a trading asset, *W.M. Robb Ltd.* v. *Page*[14] (property shown in accounts as a fixed asset for the years 1952 to 1962, held a trading asset);

(3) the statements in Directors' Reports for the financial years 1976 to 1981 that the appellant's activities were property development and the holding of property for rental – see authorities referred to in (2) above;

(4) the Memorandum of Association had as one of its objects the business of proprietors of flats – see *WM Robb Ltd* v. *Page* (where there was a similar object clause) and *Commissioners of Inland Revenue* v. *Hyndland Investment Co. Ltd.*[21] (where Lord President Clyde said, in relation to a memorandum of association which had as one of its objects the acquisition of land and the holding of the same as an investment, that the question was not what business the taxpayer professed to carry on but what business he actually carried on);

(5) the furnishing of the 7 flats at considerable expense for letting – see *West* v. *Phillips*[4] (where Wynn-Parry J. said at page 214, in relation to houses built for investment, that redecoration, making ready for sale and advertising for sale were colourless facts in that they do not change the character of such houses to stock-in-trade);

(6) the appellant did not have external borrowings for the Highpoint development and therefore was under no financial pressure to sell the 8 flats.

In contrast, there was a considerable body of evidence before the Board which pointed in the direction of the appellant being a property developer for sale, *i.e.*

(1) the incorporation of a company to purchase the property for development of luxury flats and the appellant applying for a developer's licence for sale;

(2) the appellant describing its business as property development, itself as a property developer and describing its principal activity from 1971 to 1973 and its (only) activity from 1974 to 1975 as being the development and construction of luxury apartments for sale;

(3) the omission of the appellant to document in its records as soon as practicable its alleged intention to retain part of the Highpoint development for investment;

(4) the omission of the appellant to distinguish in its accounts or its sales brochure between the flats to be sold and the 8 flats to be retained for investment, until after the other 51 units had already been sold.

(5) the omission of the appellant to object to rental income of the 8 flats being assessed as part of its trading profits.

These facts were *prima facie* in favour of the Comptroller's case and it is not surprising that the Board found against the appellant in reliance primarily on them and at the same time regarded

the neutral facts referred to earlier as being wholly consistent with the appellant's intention to carry on the business of property development for sale and no other.

Counsel for the appellant referred me to a passage in the judgment of Tan Ah Tah J. in *STU* v. *The Comptroller of Income Tax*[22] which he said was applicable to the appellant's circumstances. Mr. Justice Tan, at page 221, said:

> "In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it, however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit, does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view, be accepted."

I need to say no more than that the explanations of the appellant had been considered and rejected both by the Comptroller and the Board.

I have, so far, not touched upon the arguments of counsel for the Comptroller advanced before me, not out of any disrespect to her, but because they were substantially the same as those advanced before the Board. I need only take note of her additional argument that the appellant could only succeed in its appeal by showing that the Board had either misdirected themselves on the law or had proceeded without sufficient evidence in law to justify their conclusion: see *CBH* v. *Comptroller of Income Tax*.[18]

I have carefully considered the Board's decision and the criticisms made against it by counsel for the appellant. In my view, not only was there sufficient evidence for the Board to reach the conclusion it did, there was also other evidence which the Board could have relied upon or drawn inferences therefrom, but did not, to reinforce its conclusion. Before I deal with such additional evidence, it will be convenient at this juncture to address those arguments of counsel for the appellant which, he said, were not specifically or adequately dealt with by the Board. First, it was said that long before the tax issue arose, the appellant had consistently maintained or, rather, represented to the Controller of Housing and the Comptroller that the 8 flats were retained as an investment. The short answer to this point is that the first clear and unambiguous statement in writing of the appellant's alleged intention was made in 1975, after the Highpoint development had been completed and all (except for the 8) flats had been sold. The letter dated May 24, 1974 to the Controller of Housing did not even say that the 8 flats were being retained as investment but merely that the appellant wished to let them out and held them for letting. These representations do not prove the intention of the appellant at the time when the property was purchased but only evidence its intention at the time they were made. By itself the said letter may mean no more than what Harman J. said (at page 617) in *James Hobson & Sons Ltd.* v. *Newall*[8]:

> "when you look at the memorandum of association of this Company, it may carry on the trade of builders in two ways, one by acquiring land and building houses for sale and another by acquiring land and building houses to let. If it had not been so strenuously argued I should have said this was a very plain case. The houses built in 1928 and 1929 to let are no less so built and so let as part of the trading activities of the Company than those which were build for sale; and it is quite idle in my opinion merely to say, because we did not make immediate efforts to sell them, they are no part of our trading assets. That is only another way of carrying on precisely the same business. Builders are not bound to build houses for sale; they can also build for letting; and it is no less a part of their business if they do."

In this respect, I would refer to one point which was not taken up by counsel for the Comptroller and that was the meaning of Clause 27(a) of the appellant's Memorandum of Association. It will be recalled that the Board were constrained to neutralise any possible construction of this object in favour of the appellant by relying on the circumstances surrounding the Highpoint development. The Board might not have found it necessary to do so in that manner if it had been argued before them that Clause 27(a), properly construed, means that the business of proprietors of flats, maisonettes, *etc.* is to be carried out by purchase, take on lease or otherwise by acquisition and holding thereof and not by means of acquiring vacant land and developing the same. But, and because it has not been argued, I will place no weight on it for the purpose of this judgment.

Secondly, it was said that the description that the principal activity of the appellant was property development for sale implied or did not preclude the carrying on of a subsidiary activity of holding property as investment. Again, the answer is that the appellant could have but had never actually described in its audited accounts that its subsidiary activity was that of holding of property for rental until July 1977 when the audited accounts for the financial year 1976 were signed by the directors. It

could have done so in its accounts for any of the financial years 1970 to 1975. There was no satisfactory explanation for this omission. In fact, for the financial years 1973 and 1974, the directors even omitted the qualification "principal" in describing the appellant's activity.

Thirdly, it was suggested that the absence of any external borrowing by and therefore financial pressure on the appellant to sell the 8 flats was consistent with and evidenced the appellant's intention to hold them as investment. I think that this overstates the argument. Where a property developer acquires land substantially with external financing, that is a factor which goes to show that he is in the business of property development for sale – see *CBH* v. *Comptroller of Income Tax*,[18] but the converse proposition does not necessarily hold true nor supported by authority. In my view, this was just another colourless fact which the Board had in general terms considered and rejected as being in favour of the appellant.

Fourthly, it is said that that the Board failed to consider or draw the correct inferences from, in favour of the appellant the expressions "the construction of a block of luxury flats", "Development Project", "property developer", "principal activity" all of which were used at one time or another to describe the appellant's business. In my view, a company which describes its business as a property development or itself as property developer is *prima facie* carrying on the business of property development for sale and not for investment or for both. That, to my mind, is its ordinary meaning in a Singapore context. In any case, I find that whatever meanings the appellant might have intended these expressions and the other expressions to bear at the times they were used, their true meanings were revealed by the appellant subsequently describing its only activity as development of luxury flats for sale in 1974 and 1975 and generally conducting its affairs in conformity with the business of property development for sale.

Fifthly, it is said that an adverse inference should not have been drawn against the appellant for its failure to object to the rental income being taxed as trading receipt because it would have been futile or superfluous to have done so. This argument not only belongs to the realm of speculation, but as a hypothesis is also falsified by the fact that the appellant was and could only have been fully aware that such income was derived from the letting of the 8 flats since it had no other source of income.

To my mind, the decisive factor in the appellant's case was the quality and credibility of AW1's evidence as to the original intention of Darmadi. If his evidence had been believed and accepted by the Board, all the subsequent acts and statements of the appellant could have been coloured in support of such intention. As I have stated earlier, the Board implicitly rejected AW1's evidence on this point by finding against the appellant. On my part, I have no difficulty at all in rejecting his evidence. These are my reasons:

(1) Darmadi did not give evidence before the Board and it was not explained why he could not have done so instead of having evidence of his alleged intention given hearsay by AW1;

(2) AW1 did not explain why, if Darmadi's intention had been to develop the property for sale and investment, he advised him to form a company to do so when this could and did make it more difficult for the appellant to discharge the burden of proving that part of the development would be regarded as an investment;

(3) if, as alleged by AW1, Darmadi had told AW1 that he did not want to sell all the flats and specifically instructed AW1 to keep two penthouses for himself and to retain 8 apartments as investment, there was no reason why the appellant could not have reflected such intention in its accounts or other corporate records upon or shortly after these apartments became identifiable on the approved plans or the sales brochure; likewise there was no satisfactory explanation why the 8 flats could not then have been classified as an investment and their development cost separately itemised in the appellant's Balance Sheets from 1971 onwards; here, I should interpose to say that AW1 was not unfamiliar with the principles and complexities of revenue law – see *STU* v. *The Comptroller of Income Tax*,[22] (where AW1 appeared as counsel for the Comptroller); he must or ought to have realised that the earlier Darmadi's intention was documented and/or communicated to the Comptroller, the easier it would be to prove the existence of such intention. I should further add that, in the absence of any expert evidence that accountancy principles and practice prevailing in Singapore did not permit such classification or accounting entry, I am unable to accept the explanation offered by counsel for the appellant that it was neither practical nor realistic to document such

intention earlier than the completion of the 8 flats. The judgment of Raja Azlan Shah F.J. in *I. Investment* v. *Comptroller-General of Inland Revenue*[6] (at page 211), was cited to me as giving some support to counsel's contention; I find that it does not;

(4) AW1 said that the appellant could have sold the 8 flats at any time but did not do so because it wished to retain them as investment. Was this explanation, which contained a large element of subjectivity, the only explanation for and consistent with the act of retention? Was there no other explanation which was consistent with facts which were verifiable objectively and therefore would be more credible or probable? The facts then were as follows: (a) the offered prices of the 8 flats were substantially the same as for the corresponding numbers of the sold flats; (b) during the period 1971-1972, the appellant had sold 46 flats but only managed to sell 5 flats to outsiders in the first six months of 1973, a sign that the property market was in the doldrums; (c) the profit from the development was small; the total projected sale price of the 8 flats was about $1,250,000 whereas their development cost was attributed at about $1,027,797; (d) the flats were obviously saleable at some price but if sold at below the published prices would reduce or even wipe out the small profit margin of the appellant; (e) Darmadi was making a lot of money in Indonesia and was not interested in making small profits; (f) the appellant was not subject to any financial pressure to sell. On these facts, I have no difficulty in concluding that a more credible explanation for the retention of the 8 flats was the appellant's desire to await an upturn in the property market and to be let out in the meantime, rather than to fulfil a prior intention to hold as investment;

(5) Further, the manner in which the 8 flats was designated for retention was another factor which lent no credibility to the appellant's alleged intention. AW1 said that the 8 flats were "selected at random" and he did not know why Darmadi chose 8 and not any other number. In the circumstances of this case, the use of the expression "selected at random" was ingenuous, if not ingenious. The words suggested a preconceived plan to choose the last 8 unsold flats for investment when all that might have happened was that when the appellant came to decide at that time to stop the sale of the flats, there were, by chance, only 8 flats left unsold. The appellant never subjected the 59 flats to any selection process for 8 of them prior to the decision to stop the sales because there was never a need to do so. This would also explain why AW1 said he did not know why Darmadi decided on 8 and not on any other number. The probability was that Darmadi never had any preconceived intention to hold any of the flats as investment and so made no decision on any specific number.

(6) there was also an element of unconscious self-contradiction in the evidence of AW1: in cross-examination, he said that he:

> "was of the view that we should sell off the most expensive flats in order to make a bigger profit for the company."

but several questions later, he said:

> "The profits at that time were not very great from this development. Darmadi was at that time making a lot of money in Indonesia and he was not interested in making a few thousand dollars here and there."

Indeed, I am, in effect, being asked to believe, and I have considerable difficulty in believing and so I do not, that, for someone who, in 1970, was presumably aware of the difference, for tax purposes, between property developed for sale and property developed for investment, as evidenced by his alleged instructions to AW1 to hold 8 flats and 2 penthouses as investment, Darmadi, up to 1974, appeared not only to have done nothing to ensure that the appellant maximise the rental income and the capital return from its proposed investment and at the same time minimise its tax liability by retaining the better flats and selling the less desirable flats, but actually chose to achieve the opposite goal by agreeing to the appellant selling the most expensive flats (and thereby minimising the income and capital return on its proposed investment).

For these reasons, I am firmly of the view that Darmadi did not have any prior intention whatever of retaining 8 Highpoint flats as investment and that any such intention if any in that direction was formed not earlier than in the second half of 1973 when there were only 8 flats left.

In the result, I agree with the Board's decision. The appeal is therefore dismissed with costs.

Appeal dismissed.

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